88-369

No. 88-

Supreme Court, U.S.
FILED
OCT 17 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

DRAKE PUBLISHERS, INC.
d/b/a HIGH SOCIETY MAGAZINE,

Petitioner,

v.

JABER A. SAMAD AND
S & H MANAGEMENT CORPORATION,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ATTORNEY ETHEL CARR HUNTER MITCHELL
Counsel for Respondents
Suite 1
25 A Dronningens Gade
Charlotte Amalie
St. Thomas,
U.S. Virgin Islands 00801
(809) 776-7353

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

83pp

TABLE OF CONTENTS

Page

Table of Authorities iii

Reasons Why This Petition For Writ Of Certiorari Should Not Be Granted 1

Opinions 3

Jurisdiction 3

Statement Of The Case 3

Argument 7

1. This Is Not An Appropriate Case For Review By The Supreme Court 7
2. Rebuttal Of Petitioner's "Issues" 9
3. Petitioner's Knew They Could Defame With Fiction 12
4. Petitioner's Industry Recognized That Erotic Fiction Could Defame A Private Person 15
5. Even Petitioner's Counsel Admits That The Constitution Demands That Care Must Be Exercised When Material Is Clearly Defamatory 16
6. The Restatement Of Torts Provides That One Who Imputes To Another The Conduct Portrayed In "Savage Lust" Is Subject To Liability To The Other Without Proof Of Special Harm 17
7. The Law Does Not Excuse Defamation Just Because It Is Done In Context Of A Fictional Story 19
8. If the Petition For Writ of Certiorari is Granted this Court Should Reverse the Dismissal of Jaber Samad's Complaint against Petitioner 20

Conclusion 22

TABLE OF CONTENTS–Continued

Page

Appendices

A. "Savage Lust" A-1

B. Memorandum Opinion of Chief Judge Almeric Christian, March 2, 1987 ..... A-12

C. Memorandum and Order of Chief Judge Almeric Christian, July 2, 1987..... A-31

D. Judgment, July 24, 1987..... A-35

E. Judgment Order, April 29, 1988..... A-37

F. Sur Petition for Hearing..... A-39

G. Virgin Islands Code, Title, 1, Section 4..... A-41

H. Restatement of Torts 2d A-42

I. Defendant's Fifth Set of Interrogatories, Requests for Admissions and Demand for Production of Documents and Order..... A-50

J. Trial Transcript of Gloria Leonard on Page 330 of Volume I of the Trial Transcript..... A-52

K. Deposition of Ira Kirschenbaum, Vice-President of Petitioner..... A-55

L. Harvey Shapiro Deposition, Expert Witness For Petitioner As To Industry Standards A-57

TABLE OF AUTHORITIES

Page

CASES:

Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) 9

Dunn & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 105 S. Ct. 2939 (1985) 7, 8, 9, 10

Gazette, Inc. v. Harris, 325 S.E. 2d 713 (Va.), cert. denied, 472 U.S. 1032 (1985) 18

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 1, 7, 10, 16

Hustler Magazine Inc. v. Falwell, ___ U.S. ___, 108 S.Ct. 876 (1988) 10

New York Times v. Sullivan, 376 U.S. 254 (1964) 9

Restatement (Second) of Torts:

§ 558 6

§ 559 6

§ 561 6

§ 564 ..... 6, 11, 19, 21

§ 569 17

§ 570 17

§ 571 17

§ 573 17

§ 574 17

§ 580B 19

1 V.I.C. 4 7

REASONS WHY THIS PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Supreme Court held in *Gertz v. Robert Welch* 418 U.S. 323 at 347

> "So long they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injuries to a private individual."

This is exactly such a case. The District Court and the Third Circuit followed this Court's ruling. A private party was damaged by a false defamatory publication. No error was committed.

Respondent, S & H Management Corp., owned and operated the Carousel Bar on the island of St. Thomas, U.S. Virgin Islands when Petitioners, Drakes Publishers, Inc. d/b/a High Society Magazine published the story "Savage Lust" in its December, 1981 issue. The real Carousel Bar had been in existence for over twenty years and occupied a very prominent position on the waterfront. The real bar was popular with local people and tourists alike.

The Carousel Bar in "Savage Lust" was described as "a nondescript sailor's dive complete with half naked Martinique whores, cheap rum and fried chicken drenched in ketchup." The owner of the Carousel Bar drugs a girl, kidnaps her and forces her to submit to a night of sodomy and rape. (District Court Memorandum Opinion App. A at 9).

"Savage Lust" was a false, defamatory publication about a private party involving no issue of public concern. Over 400,000 copies were distributed throughout

the United States and the world. The bar was recognized by recipients who reasonably believed the story to be of and concerning the real Carousel Bar in St. Thomas.

The District Court, after a bench trial in which the publisher of High Society testified that she'd personally visited St. Thomas numerous times before publishing "Savage Lust," found that she knew of the existence of the real Carousel Bar when she published the offending publication.

The author of "Savage Lust," Russell Smith, knew of the real Carousel Bar for years before writing the story and had visited it less than two months before he wrote "Savage Lust." He'd asked for and been denied permission to write a story about the owner of the Bar. The publisher never got or even asked the author for a disclaimer that "Savage Lust" did not depict or portray a real person or place.

S & H Management Corp. the owner of the real Carousel Bar sued and was awarded judgment of Seventy Five Thousand ($75,000.00) Dollars in presumed damages.

The Third Circuit Court of Appeals after briefing and oral argument unanimously affirmed the judgment. The panel then denied the petition for rehearing en banc.

This petition for Writ of Certiorari should be denied because this case raises no conflict between the circuits that needs to be resolved; presents no question of federal statute or federal common law that requires resolving; and is a case involving a purely private plaintiff defamed

by an admittedly false and defamatory publication involving no matter of public concern.

OPINIONS

After a bench trial the District Court of the Virgin Islands issued its Memorandum Opinion on March 2, 1987 (Appendix C) Judgment was entered July 24, 1987. (Appendix D)

The United States Court of Appeals affirmed unanimously by Judgment Order issued April 29, 1988 (Appendix E). Petitioners request for rehearing en banc was denied May 31, 1988. (Appendix F)

JURISDICTION

Jurisdiction of this Court is invoked by Petitioner pursuant to 28 U.S.C. 1254(1). The District Court of the Virgin Islands had general original jurisdiction of this matter pursuant to 48 U.S.C. 1612(1). Jurisdiction of the appeal vested in the United States Courts of Appeal for the Third Circuit pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

The December, 1981 issue of High Society Magazine featured a story about the Carousel Bar located in the Caribbean on the island of St. Thomas. It began with a

two page color picture of the waterfront of St. Thomas with a cruise ship in the background, behind a naked blonde girl. The story entitled "Savage Lust," called fiction, described the Carousel bar as a

> "nondescript sailors' dive complete with half-naked Martinique whores, cheap rum and fried chicken drenched in catsup."

The owner drugs a young lady, kidnaps her and takes her to his condominium on the beach. When she awakens she is strapped to a mattress and left in the sun. After going in and out of a drugged stupor, she is forced to engage in cunnilingus and fellatio with the black servants of the owner of the Carousel Bar. She is then injected with a needle, given another drug, and is forced to submit to repeated acts of sodomy with the owner of the Carousel Bar. She awakens on the cruise ship, the "Song of Norway," as it leaves St. Thomas. (Appendix A – "Savage Lust")

Although the story was called "fiction" respondents proved that at the time when it was written, the author, Russell Smith, knew there was a *Real Carousel Bar on the waterfront of St. Thomas*. Smith had visited St. Thomas for many years and knew the Carousel bar very well. His wife had worked there. The bar had been in operation for *over 20 years* at the time that the story was written. Less than 2 months before he wrote the story, Russell Smith had been in St. Thomas and had been evicted from the Carousel Bar by the owner when he tried to get the owner involved in a sexual menage a trois with himself, his girlfriend and the owner. Smith had asked for permission to write about the owner of the Carousel Bar and had been denied. Two months later Smith went back to

New York, wrote "Savage Lust" about the Carousel Bar in St. Thomas, submitted it to High Society Magazine and had it published.

Respondents also proved that at the time when the publishers of High Society Magazine accepted and printed "Savage Lust," they also knew there was a Carousel Bar in St. Thomas. Gloria Leonard, the publisher, testified that she had lived in Puerto Rico in the 1960's (thirty miles from St. Thomas) and had visited St. Thomas many times. This was in the time when the Carousel Bar was in its "hey day." (Memorandum Opinion, App. B at 10) The Carousel Bar was right on the waterfront of St. Thomas. Gloria Leonard had walked the waterfront as had Ira Kirschenbaum, the vice president of High Society Magazine before they published the story. The Carousel Bar was a bar in the middle of the most heavily traveled section of St. Thomas. Part of it included open tables on the waterfront. It occupied a prominent position on the waterfront. At petitioner's insistence it was deemed an admitted fact that you couldn't walk the waterfront without having seen the Carousel Bar. (App. I at 31)

Ms. Leonard testified that she specifically remembered two stores on *both* sides of the Carousel Bar. Gloria Leonard never asked Russell Smith for a waiver or representation that "Savage Lust" did not depict real places. She knew the Carousel Bar existed when she published "Savage Lust."

In addition, the two page color illustration indroducing the story was a vivid depiction of the *actual view* from the Carousel Bar in St. Thomas. The picture showed the waterfront. It showed a cruise ship in a position where

the cruise ship, the Song of Norway would have been if you looked out from the real Carousel Bar.

There was also testimony from the vice president of the magazine through his deposition that High Society Magazine had a policy of getting disclaimers from their authors before publishing such stories, even fiction, but that in this instance they had not done so. On the basis of these facts the District Court found fault on the part of the publisher. The Court found that the petitioners acted with reckless disregard in publishing "Savage Lust" even if they didn't know there was a bar of the same name in existence. The Court also had the testimony of Gloria Leonard that she would have published "Savage Lust," even if she'd known there was a real Carousel Bar. (Testimony of Gloria Leonard at trial App. J at 36)

The District Court of the Virgin Islands followed very strictly the provisions of the Restatement of Torts, which is the law in the Virgin Islands in the absence of state statute, (Appendix G), in its Memorandum Opinion (Appendix B). (Restatement of Torts 558, 559, 561, 564 App. H) "Savage Lust" was false. It was defamatory. It was reasonably believed by recipients to have portrayed the respondents. It damaged the reputation of respondents and lowered the esteem with which its business was held in the community.

This is clearly a case involving a private person defamed by a publication, and exactly the kind of case that is properly within the state's jurisdiction to decide. This is not an appropriate case for decision by the Supreme Court. It is not a case of first impression. It is

strictly a case of a private person defamed by a publication involving no issue of public concern. There is no conflict among the circuits to be resolved. There is no issue of constitutional law that has to be resolved. Petitioners seek a license to defame. They seek to have the court ignore hundreds of cases involving the law of defamation. They published a false, filthy story, naming a real business, in a real city, visited by thousands and thousands of tourists every year. They used the actual name of the bar and a picture of the actual view. They knew it existed. They circulated over 400,000 copies of the magazine worldwide. People read the story, identified the real Carousel Bar with the one in the "Savage Lust." This is a clear case of defamation no more and no less.

ARGUMENT

1. This Is Not An Appropriate Case For Review By The Supreme Court.

There is no conflict among the circuits that needs to be resolved. Petitioners have not cited any conflicts in the circuits caused by this case. This case does not involve a Federal Statute or Federal Common Law. Again petitioners have not cited any federal statute or federal common law that was misinterpreted or misapplied.

This case is precisely the type of defamation case referred to in *Gertz* and *Dunn & Bradstreet* involving a private person, not involving any issue of public concern.

The United States Supreme Court in *Gertz v. Robert Welch Inc.*, 418 U.S. 323 (1974) held that in defamation cases where the plaintiff is a private person, the *States*

may define for themselves the appropriate standard of liability so long as they do not impose liability without fault. *Samad et. al. vs. Drakes Publishing Inc. d/b/a HIGH SOCIETY MAGAZINE* is such a case. The District Court of the Virgin Islands (acting as a finder of fact), following that mandate found *fault* on the part of High Society Magazine in publishing the article "Savage Lust." It found that High Society had knowledge that the statements were false when they were published and that even if they didn't actually know, they published the statements with reckless disregard.

As stated above, the defamatory potential of "Savage Lust" was apparent. Petitioners had policies of getting disclaimers before publishing. They did not get any such disclaimer here. The publisher was at fault.

In *Dunn & Bradstreet v. Greenmoss Builders Inc.* 472 U.S. 749, 761, 105 S. Ct. 2939 (1985), this Supreme Court held that in a case involving a private plaintiff and regarding a matter of private concern both presumed damages and punitive damages, may constitutionally be awarded on a showing of negligence.

The District Court was constitutionally permitted to award damages upon a finding of fault as long as it did not utilize strict liability as a basis. The District Court was thus constitutionally permitted to impose presumed damages in this case.

Because each state under these circumstances is free to fashion its own standard for damages up to and including "presumed damages and punitive damages," the issue of whether a particular State, or Territory followed its own law in arriving at the damages awarded *is*

not of CONSTITUTIONAL dimensions. That issue, you have said in the *Dunn & Bradstreet* case said, is for the state Courts to decide. The District Court, as our state court in this case, and the Third Circuit, as our appellate court have decided. This is not now a matter of federal or constitutional law for the Supreme Court of the United States.

2. Rebuttal of Petitioner's "Issues"

Petitioner relies on *Bose Corp v. Consumers Union of the United States* 406, 485, 514 (1984) and *New York Times v. Sullivan* 376, 254, 258 (1964) in arguing the Third Circuit Court of Appeals "presumably" failed to review the entire record. There was no need to. The issues are matters of state concern where fault has been conclusively established as it was on this record. The *Bose* case predates the *Dunn & Bradstreet* case.

The Court in *Bose* found the defendant to be a "public figure." Here this plaintiff is a private figure. The Court was concerned about an "opinion" rendered about a speaker system, not about sexual impropriety and moral depravity in a story about a real place.

Petitioner's statement of this case concedes that it is a defamation cae involving a private plaintiff regarding a matter of purely private concern. Per this Court's decision in *Dunn & Bradstreet*, petitioner should not be allowed to claim "fault" because of a claimed failure of a review of the entire record for First Amendment issues. By definition therefore, this is not a First Amendment case that needs to be reviewed by this Court.

Issue II fails for the same reason as Issue I. This is no FIRST AMENDMENT case. Plaintiff is a private person. So long as they do not impose liability without fault, the states may define for themselves the appropriate standard of liability or broadcaster of defamatory falsehood injurious to a private individual. See *Gertz v. Welch*, 418 U.S. 323, 347. Furthermore, when the "speech involved matters not of public concern . . . the state . . . (may allow) . . . awards of personal and punitive damages--absent a showing of actual malice" *Dunn & Bradstreet v. Greenmoss Builders Inc.* supra pp 761. The issue of culpability regarding fiction is moot in this case. The District Court found fault as a fact i.e. that the principals of the magazine knew of the existence of the Carousel Bar in St. Thomas, Virgin Islands and subsequently published the false statements with reckless disregard as to their truth or falsity.

As to upholding publishing of fiction standards, High Society Magazine itself established a policy i.e. and it insisted that an author sign a disclaimer that the publication would not infringe on any privacy or other right of any individual or entity. The Court found as a fact that High Society was culpable for violating *its own established policy.*

Petitioner's argument that fiction as parody should be exempted from the "private plaintiff matters of private concern" cases, and citation of *Hustler Magazine Inc. v. Falwell*, ___ U.S. ___, 108 S. Ct. 876 (1988) does not aid petitioner at all. That case is strictly one permitting parody of a *public figure.* The Court after clearly establishing that right as to public figures, pauses to admonish that

this principal is subject to limitations. It does not open the door to defamation by fiction as petitioners assert.

Petitioner is not saved by labeling each of its articles "fiction" and then proclaiming that fiction by definition is an untruth. They ask for a law that would allow the publisher to name real places, real people and real businesses without a duty to make an investigation in that location to determine whether the fiction may reasonably be understood as portraying an actual person or business. The Restatement (second) of torts section 564 comm. d recognizes such an investigation and determination as a publisher's duty. This duty to investigate is especially so with "fiction," since "fiction" is never a "rush to press" matter. Even giving petitioners the benefit of the doubt, there was time to investigate. There was no "hot news" deadline to prevent this investigation. High Society acted negligently and with reckless disregard when it published without investigating and without a disclaimer from its author.

Petitioners third question regarding the finding that "Savage Lust" was "of and concerning" Respondent's Bar is one of fact and not of constitutional dimension. It was an established fact that Respondent's Bar existed on the Waterfront of St. Thomas for *twenty years before* the publisher published "Savage Lust." The Carousel Bar was recognized by persons in Boston, St. Thomas and elsewhere as being the Bar referred to in "Savage Lust." The reader's belief that it was of and concerning respondent's bar was reasonable. There is no case that holds that a defamatory story must refer "specifically" to the defamed person and only to him as petitioner argues. Nevertheless

the facts here could still stand up to the standard proposed by petitioners.

3. Petitioner's Knew They Could Defame With Fiction

Petitioner's employees knew they could defame with fiction. Petitioner knew that it was quite possible to defame a real person with fiction. For that reason it had a strict policy of getting disclaimers before publishing such stories. Petitioner required its authors to give it disclaimers. It's purchase order forms also contained language disclaiming any violation of private person's rights. No such disclaimers were produced for "Savage Lust."

As professionals in the field of publishing, petitioner had a firm policy designed to insure themselves against defamation claims. Their vice-president, Ira Kirschenbaum testified at his deposition as follows:

> Q. Was there any procedure for rejecting an article if it appeared to depict a real person or place?
> A. As I generally said, we try to publish only fiction, since we are a non-controversial magazine, and if we felt anything was real, it would be rejected immediately. (Appendix K at 37)
> Q. In your professional opinion if you knew that this article referred to a specific business, would you have required an investigation?
> A. Yes.
> Q. Have you ever refused to publish an article that referred to a particular person?
> A. Yes. (App. K at 37)

When asked specifically what if any policy petitioner had regarding libel, Mr. Kirschenbaum responded as follows:

> Q. What exactly were you told or what information were you given with regard to libel?

A. Never to depict real people or real places in stories, unless they are meant to be that way.
Q. How many persons in your organization were told of this?
A. Everybody who worked on the magazine. (App. K at 37).

A. Still the same guidelines. Try to make sure everything is fictional, but we do not have an investigative team to go out into the field and research every story that comes in.
Q. When a story comes in, do you find out if there is such a place? You name St. Thomas.
A. We try to. (App. K at 37)

Kirschenbaum testified that Gloria Leonard knew that such a story had to be checked out before publishing. He testified as follows on that point:

Q. Did you have any discussions with Ms. Leonard as to procedures for investigating your stories?
A. Ms. Leonard does have a general working knowledge of what should be checked out before a story is published in High Society Magazine.
Q. Did you give her that knowledge?
A. We gave it to her, plus we have discussed it many times in our organization, although there are no formal written guidelines.
Q. What exactly was discussed?
A. That anything that is published should be checked out as carefully as possible and that if it is actual, that releases be obtained and if it is fictional, make best efforts. (App. K at 38)

See also the testimony of Gloria Leonard in Appendix K at 33 and the subsequent observation of the Court:

Q. Do you believe that you are – as a professional, is it your opinion that you can libel someone in a fiction?

A. I believe you can. (lines 14-17)
Q. And as a professional, when would that occur?
A. Again –
MR. ARELLANO: Your Honor, that question is vague.
THE COURT: It isn't that it is vague, but you see now, Mrs. Mitchell, you have gotten this witness to answer a question in a way that is directly contrary to Mr. Arellano's opening statement as a lawyer.
MRS. MITCHELL: I know.
THE COURT: What do you expect me to do accept her word on this matter?
MRS. MITCHELL: No. She is the publisher and I think it is from her that the policy of her magazine and the policy of the industry should be learned.
THE COURT: The policy of the magazine is certainly within her competence. The policy of the industry is within her competence. But the legal aspect is not.
MRS. MTCHELL: I am not asking for the legal aspect. I was asking her to define for me what –
THE COURT: You asked the witness a moment ago something to the effect of whether it was possible to libel somebody in a piece of fiction and the witness answered, yes.
MRS. MITCHELL: Yes.
THE COURT: All right, Mr. Arellano in his opening statement said, did he not, that specifically because this is purely fiction it can't be libel?
MRS. MITCHELL: And your Honor, I am trying to show that the publisher knew that it could be possible to libel someone in fiction.
THE COURT: All right, very well. She has answered your question.

The District Court had ample evidence to find that petitioner knew it could defame with fiction and had a policy designed to protect them from defamation suits. They didn't follow it this time. The testimony of Mr. Kirschenbaum says they did. Ms. Leonard admitted

under oath that she recognized the potential for defaming a real person. Petitioner used disclaimers and releases. All of this was company policy because they recognized the exposure and the damages. They were at fault for not following it.

4. Petitioner's Industry Recognized That Erotic Fiction Could Defame A Private Person.

Petitioner produced Harvey Shapiro as an expert witness. Mr. Shapiro has a long history publishing erotic magazines. Mr. Shapiro admitted that erotic fiction could defame a private person. Mr. Shapiro stated that he would not include the name of a person in such a story if it seemed to identify that person. He even admitted that the actual identification of a private person in an erotic fiction story could be defamatory if it were not true.

> Q. Would you knowingly include the name of a business, an existing business, in one of your stories in a manner that would be derogatory or defamatory?
> A. No.
> Q. Would you include the name of a person who lives in a place if you knew that story is supposed to be about that person or seems to identify that person?
> A. No . . . (next question omitted)
> Q. Do you think that the identification of a private person in an erotic fiction story would constitute defamation if it were not true?
> A. Yes, I guess so.
> Q. Would you feel responsible if you defamed a real person?
> A. Yes. (App. L at 39)

Clearly the industry recognizes the danger that this type of material can do to a private person's reputation.

Mr. Shapiro disagrees with the stated position of petitioner's counsel that the very nature of fiction makes it impossible to defame a real person. Mr. Shapiro, we may assume, from his responses would not publish "Savage Lust" knowing that the Carousel Bar actually existed in St. Thomas.

5. Even Petitioner's Counsel Admits That The Constitution Demands That Care Must Be Exercised When Material Is Clearly Defamatory.

Petitioner admitted in its appellate brief that there is a duty on behalf of the publisher to investigate when the defamatory potential of the material is "apparent." On page 26 of its brief to the Third Circuit Petitioner concedes that the Constitution would permit a standard of negligence where the publication makes "substantial danger to reputation apparent." *Gertz v. Robert Welch, Inc.* 418 U.S. 323

Only a sexual pervert or a very jaded person could have failed to recognize the defamatory potential of "Savage Lust" if someone was identified. Perhaps in the world of so called "erotic literature" nothing is wrong with being described as the bar and the type of character portrayed as the "owner of the Carousel Bar" in "Savage Lust." Maybe their literature is so full of places like those described therein that they do not recognize the level of immorality and sleaziness attributed to the Carousel Bar and its owner in "Savage Lust."

This may explain why petitioner found nothing "apparently defamatory" in publishing a story about a real place that is described as being

> a nondescript sailors' dive complete with half-naked Martinique whores, cheap rum and fried chicken drenched in catsup.

Perhaps to petitioner it is desirable to be portrayed as a person who would drug a customer's drink, have her chained to a mattress, watch while others acting under your direction force her to have oral sex, and afterwards have anal intercourse with her while she is under restraint.

Whether or not petitioner recognized the defamatory potential of that publication respondents believe that most persons would and know that the law as codified in the Restatement of Torts (Second) does.

6. The Restatement of Torts Provides That One Who Imputes To Another The Conduct Portrayed In Savage Lust Is Subject To Liability To The Other Without Proof Of Special Harm.

To be described as one who would do the acts described in "Savage Lust" is defamatory per se. Restatement of Torts 569, 570, 571 (Appendix H). The whole story is about how the "owner of the Carousel Bar" drugs this girl and forces her to submit to sexual battery. Such conduct is criminal. People go to jail for that kind of activity.

571 of the Restatement of Torts (Second) states

> One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is to a type which, if committed in the place of publication, would be (a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude.

Spiking a young woman's drink, kidnapping and committing sexual battery on her, all actions of the "owner of the Carousel Bar" would certainly constitute criminal offenses and or involving moral turpitude.

Section 573 of the Restatement of Torts involve imputations which adversely affect another's fitness for the conduct of his trade or business. Certainly no decent person wants to go to a bar like the one described in "Savage Lust," and/or be served by a person like the owner. Section 574 defines slanderous imputation of sexual misconduct. "Savage Lust" was full of all of these things. No decent person would want to associate with someone who would do this, nor visit an establishment in which such activities took place.

The defamatory potential of this story was clear as a bell and should have been apparent to petitioner's publisher. *Gazette, Inc. vs. Harris* et. al. 325 S.E. 2d 713 (1985) discussed some of the things that are considered apparently defamatory. An article in which a man is stated to be "man found guilty of fornication" was "apparently defamatory." Certainly if to describe a person as *guilty of fornication is apparently defamatory,* the actions described in Savage Lust are much more serious and glaringly potentially defamatory. Another article accusing someone of issuing a bad check also found to have been apparently defamatory.

It should also be noted that the Supreme Court of Virginia has an excellent discussion in *Gazette* on the application of the new Supreme Court's rulings regarding defamation by state courts. The Court goes on to discuss

the application of the Restatement in defamation cases and the standards of care to be applied.

I would hope that even the petitioner would admit that risk of defamation exist whenever one publishes a story that some local person, any person, would kidnap a tourist in a local bar, drug her and force her to submit to multiple rape.

I don't believe that the petitioner could deny that kidnapping is a criminal offense; that sexual battery is a criminal offense; that forcible drugging is a criminal offense. In view of this, the defamatory potential of "Savage Lust" was "apparent" and petitioner is liable for the damage that resulted to respondent personally as well as to his business.

7. The Law Does Not Excuse Defamation Just Because It Is Done In Context Of A Fictional Story.

The First Amendment does not grant a license to defame. The Constitution does not say, as petitioner urges, that as long as you call it "fiction" it is clean and neat and cannot defame anyone. The Restatement of Torts, 564(d), does not permit one to escape liability when one defames, merely because you call it "fiction." If recipients of the publication reasonably believe that a defamatory publication intended to refer to a real person, that person is defamed. See also section 580B. (Appendix H at 29)

Petitioner is subject to the provisions of the Restatement in this jurisdiction just as any one else. While petitioner enjoys the benefits and protection of the First

Amendment and the local law, so does respondent. Petitioner must respect the legal right and interest of a person in protecting the integrity of his or her good name and reputation. The District Court did not commit reversible error when it rejected petitioner's argument that liability could not be found because it is "fiction" and one cannot investigate or "vet" as they choose to call it, fiction. The Third Circuit summarily rejected it. The Supreme Court should also.

8. If the Petition For Writ of Certiorari is Granted this Court Should Reverse the Dismissal of Jaber Samad Complaint Against Petitioner.

If this Court grants the Petition for Writ of Certiorari, the finding that "Savage Lust" was not "of and concerning" Jaber Samad should be reviewed, reversed and damages awarded.

Respondents proved that Jaber Samad was the sole owner of the Carousel Bar at the time that "Savage Lust" was published. He had a blonde, beautiful, buxom girlfriend who looked like Margo Boland in the picture.

Respondents proved through the depositions and testimony of his witnesses at trial that readers, people in general community and his family, actually believed that Jackson Conrad alias Jack O'Connor in "Savage Lust," was intended to refer to Jaber Samad. Respondents proved and the *District Court held that*

> His (Jaber Samad) family became alarmed at Samad's seemingly decadent life style forced him to give up his girlfriend, and returning to Palestine. There plaintiff was virtually coerced by his family into a marriage with a Palestinian young lady whom he hardly knew, and did not love. The marriage though

> consummated, proved to be an unhappy one, but evidently accomplished its purpose, the appeasement of Samad's relatives. Plaintiff later returned to St. Thomas. *He did not, however, regain the trust and respect of his family.* (Emphasis added) (Memorandum Opinion App. B at 17)

Thus, respondent proved a false and defamatory publication was believed to be about him personally and caused him to lose the most important relationship of a person, that with his family. Tremendous damage was thus suffered by the individual, Jaber Samad.

The "similarity between Samad and Conrad is their association with the bar named the Carousel" (App. B at 21) is enough to have found that the "Savage Lust" was "of and concerning" Samad. The Restatement of Torts (2d) §564 (d), comment 6 specifically states that "it is enough if there is such a description of *or reference* to him that those who hear and read, reasonably understand the plaintiff to be the person intended (App. H at A - 27).

Respondent proved that people thought "Savage Lust" was "of and concerning" Jaber Samad because of its *reference* to him by his ownership of the Carousel Bar, by reference to the description of his girlfriend and by reference to his apartment being at Sapphire on the beach.

There were sufficient facts from which to find reasonable the actual belief of plaintiff's family that "Savage Lust" was "of and concerning" him personally, as well as of and concerning business.

That part of the District Court's Judgment that denied recovery for such damage to Jaber Samad should be reversed.

CONCLUSION

The District Court of the Virgin Islands and the Third Circuit Court of Appeals having followed this Court's direction and having awarded presumed damages after a finding of fault on the part of the publisher of a defamatory publication, should be affirmed. No conflict among the Circuits is raised. No issue of Constitutional law needs resolving. Petitioners seek a license to defame. They should not be granted it.

This petition for a Writ of Certiorari should be denied.

DATED: October 17, 1988

Respectfully,

ETHEL MITCHELL
Counsel for Respondents

APPENDIX A

"SAVAGE LUST"

by Russell Smith

Jackson Conrad was the day bartender at Malcolm Cunningham's joint for two years, missing only two days work and late on a single occasion when the taxi in which he was speeding to worked crashed into a stalled bread truck.

Unlike average bartenders, Jackson had a special smile for all the girls and – as they say in the ginmill business – a tin ear, meaning he could arbitrate any bar argument with exquisite grace. He listened to his customer's monotonous dreams of success and weekly catastrophes like a priest hearing confessions. Jackson never forgot a face and remembered one man's poison from another's with astonishing accuracy.

At the end of his day Jackson dutifully counted the cash and fixed the "bank" for the night man before bagging the take and dropping it off at the Second National's night vault on the way to his hotel. For two years, day in and day out, Cunningham's cash register jingled merrily and business maintained a daily average that made the owner's heart glow. Jackson Conrad's absolute dependability never failed to impress everyone in the ginmill business. A steady bartender who didn't cheat somewhere along the line or drink up the profits was as rare as a bronze tiddlywink.

Then, one Friday, no Jackson Conrad! The regulars fretted and speculated on the stoop next door while

waiting for Jackson to open up. After two hours, Cunningham was telephoned the bad news. He hurried over. The kind of calm associated with impending disaster settled over the silent bar like an evil fog. When that longest day had ended, Jackson still hadn't appeared. Neither had he called. Cunningham dispatched one of the regulars to Jackson's hotel, only to find that Jackson Conrad had checked out!

The weekend dragged. It wasn't until the following Monday, with Cunningham himself behind the stick, that he decided to call the bank. The neighborly bank officer jokingly reported that the bank's very foundations were quaking since Cunningham's last withdrawals.

"What withdrawals?" Cunningham suddenly felt weak in his knees.

Jackson had forged withdrawals slips for all three of the bar's working accounts. The details were enough to drive even Cunningham to drink. Jackson had literally wiped him out!

The Carousel Bar on the island of St. Thomas in the U.S. Virgins is a nondescript sailors' dive complete with half-naked Martinique whores, cheap rum and fried chicken drenched in catsup. Isolated in a barrio section of Frenchtown, the Carousel is a symbol of tropical decadence and moral decay that puzzles as much as it delights. It attracts a breed of first-class cruise ship tourists and crew who find the cheap and gaudy atmosphere exquisitely quaint and the artificial desperation of the derelict clientele amusing. It's the last place of the face of the planet anyone searching for the fugitive Jackson Conrad would look.

It was by sheer coincidence that Margo Boland, once one of Cunningham's prettiest customers and well known to Jackson for her ritualistic consumption of Bombay gin, sailed the cruise ship "Song of Norway" into the harbor of St. Thomas exactly two months to the day after Jackson's masterful coup. Keeping a date with a nice man she had met on board who said he knew of a quaint native bar with a mandolin player and tasty fried chicken, the Fates collided and Margo ran into Jackson. She was familiar with every detail of Jackson's coup and secretly admired him for it. A more brilliantly executed maneuver, one of stealth, consummate cunning, boldness and utter courage, existed only in fiction.

As Margo observed Jackson from the deepening shadows, his green mirrored glasses reflecting the existing light, she felt an unquenchable surge in her loins. He was puffing easily on a thin cigarillo and wearing a stunning white tropical suit and native straw hat of green bamboo. She suddenly felt an unscratchable itch bubbling behind her pink nipples. Margo couldn't believe her eyes. The incredible churning sensation of wild excitement in the pit of her stomach intensified as she stared at Jackson.

"What is wrong, dear Margo?" her companion asked.

She shook her beautiful blond head. "Oh nothing. Nothing, really." Margo smiled her sweetest smile. "It's nothing, Charles. I just suddenly feel like being alone." She touched his shoulder. "You wouldn't mind terribly, would you Charles It's just one of those nostalgic things that girls go through."

Charles was noble, and after being reassured with a firm squeeze on his semi-erect penis that she could find

her way back to the ship, he whispered, "Margo, I'll see you back to the ship, he whispered, "Margo, I'll see you back on board. I do understand, dear. Come to me for a nightcap. Cabin 904."

Changing her table for a less conspicuous one in the shadows, Margo reflected on Jackson's scam. An hour passed and she let herself be picked up by a U.S. Coast Guard officer, from whom she learned the current news and rumors about Jackson. He was now known as Jack O'Connor. He was extremely rich, and upon his arrival had bought the Carousel for cash. He visited it from time to time to check on the bartender and the till. He owned a house on the sea, kept three natives servants and read a great deal. He was a loner, made no fresh friends and kept few acquaintances other than those to whom he paid local business graft. Everyone familiar with Mr. O'Connor believed he had done hard time in some foreign jail and was now on parole, minding his own business in an agreeable way.

As the officer went on about himself, Margo let him nibble her lips, kiss her eye, use his tongue and feel her ripe breasts. At the same time, she didn't discourage his hand from stealing up under her skirt to finger her moist pussy. Her hunger for Jackson was becoming so fierce, so intense, that she broke out in a cold sweat. Margo had always craved Jackson's superb body, a savage lust.

"Are you all right?" the Coast Guard asked. He was alarmed and pulled his hand from between her bare thighs as if it were burning.

Margo rubbed sensuously against his shoulder. She used her soft stare. "Yes," she purred, brushing her lips

over his. "Yes, but don't stop. Put your nice fingers back where they were. Touch my pussy. It's all wet. But tell me more about that mysterious man."

Suddenly her glance flew to Jackson and a wild shiver swept over her like an eight-foot tidal wave. He was staring at her! Jackson took off his mirrored glasses and squinted. He recognized her!

He pushed his way rudely through the natives jiving on the dance floor. Margo came as close to fainting as she'd ever remembered. Ever pore was oozing blood. Her mouth flew open, her eyes zoomed in and out of focus. She caught her breath in fear as his bulk loomed closer.

There was no escape. Oh God! Blinded by reality, Margo suddenly saw Jackson as the young Orson Welles – chin slanted, eyes piercing, his tongue moistening his lips. With a gentle clearing of his throat and that thin smile from behind dark, leaden eyes, he sat next to her.

* * *

Jackson's house was down by a secluded crescent beach, where his yacht, the "Bally-hoo,", swayed at anchor in the light Atlantic breeze. The landing dock was simmering in the tropical heat when Margo surfaced into consciousness.

She was naked except for her high heels. As she struggled to clear her brain, she discovered she was chained to a mattress spring. The raw metal was cutting into her flesh. Able to raise her head slightly, she saw a criss-cross pattern of pink welts lacing her thighs which were spread obscenely by the chains locked to her ankles.

Soon she realized she was lying on a cement patio facing the ocean. The tide was lapping gently, a lone gull crying in the distance. She could still taste whatever it was Jackson had drugged her with back at the table. Margo strained and tugged with all her strength. The hot sun blasted the unsheltered portion of the patio and boiled the breezes that fanned her nakedness. She wondered suddenly if she'd been raped. Unable to stretch her neck high enough to search between her thighs, she moved the muscles of her pussy, but they responded with no intelligent signal.

Drifting in and out of consciousness, she recalled Jackson's first words – how politely he had dismissed the Coast Guard lieutenant, how eagerly she had accepted his invitation for a drink. "Margo, for old times' sake," he had said. "We'll have no comment about this coincidence, right? But I am pleased to see you again, despite the circumstances. You are still so beautiful, so sexy!"

She clung to him. "Many people missed you terribly, Jackson. You were part of our lives."

Margo was unafraid, secure she could cope. How many hundreds of times had she sat opposite this handsome man at Cunningham's bar? For two years she'd been served by Jackson Conrad. She could not recall a single time when he'd been anything but kind and polite, tender with a compassionate understanding. He had always greeted her with piercing but friendly dark eyes – eyes she secretly directed to caress her breasts, to seek indecencies on her body, to linger on her bare arms, to caress her fingers and her exposed thighs when her slit skirt would open and ride up. When Margo used the

ladies room and wiped her moist pussy, she would image Jackson's beautiful eyes on her naked pussy lips, penetrating as deeply as she wished his cock would. Once, when her period struck in the bar, Jackson provided an emergency tampon. The intimacy impressed her.

Margo could never count the number of soft afternoons alone with Jackson when she had fantasized about him asking her to fuck his cock at the end of the bar, to suck him off down on his knees begging to lick her aroused pussy in the ladies' room as she sat on the toilet vulgarly peeing. Of course, it had never happened. Many a lonely night Margo masturbated her clitoris while imagining the iron beauty of Jackson's cock, his magnificent body, his hot lips on her stiff nipples, his long fingers stroking, squeezing, splitting her luscious buttocks, his tongue in her asshole.

She must have been awake now for more than an hour. She began to call his name, softly at first, then with increasing urgency until finally she was screaming at the top of her lungs. She sobbed in and out of scattered dreams. As dusk settled on the Caribbean, her body began to ache. The raw steel springs were lacerating her skin. Margo's delicate wrists and ankles were numb from struggling and twisting, her left wrist severely swollen.

Night came and Margo was cruelly awakened by a bright burst of light flooding the patio. Her screams careened and ricocheted in the darkness like lazer beams. She tried to relax, urine flooding out of her. Suddenly thirsty, her lips were dry and crackling. Would no one come to help? She began babbling, humming nonsense tunes.

It grew late and Margo was asleep again when she felt her wrists and ankles being released. Then, in the darkness, she felt her aching, tormented body being lifted and carried through a doorway. The icy blast of air conditioning made her shudder.

Now she was being washed with scented oils by a naked black girl. A younger girl watched without smiling. A tall back man, a giant, with an enormous erection, fondled himself absently as he stood at the foot of her bed, the white of his eyes like that of his teeth and the sheets.

"Tell me where I am. Please. Where is Jackson? Please help me. I can pay, I beg you!"

No one spoke. The stone-faced black girl was now kneeling, pushing Margo's knees up and licking tentatively between her open thighs. Her red tongue explored Margo's pussy. Margo tried to raise herself to soothe her inflamed wrists, but the black man slapped her face. The younger girl was now rubbing oil over Margo's breasts, massaging them lasciviously, pinching her nipples and slapping her breasts with her open hand.

The black man stood. He climbed onto the bed to straddle his thick hairy thigh around Margo's head. He whispered to her to open her mouth. Margo surrendered. Wordlessly, guided his heavy black weapon between her lips. Margo sucked and flashed her tongue, her eyes closed. "Open your eyes, bitch!" he said.

Flexing her fingers and toes, Margo spread her legs wider as the girl on her knees sucked and chewed her pussy lips. When Margo felt the first tickling in her clitoris, she began to squirm. She tried to pinch her hot

nipples, but the black man pushed her hands away. His glistening cock slid silently in and out of her wet mouth, her head rising and falling as she slurped and gulped him.

When she felt the black's cock begin to pulsate and sensed it was on the verge of ejaculation, she reached for it. Her fingers curled around the slippery wet rod. Her other hand grabbed greedily for his sweating balls. She squeezed and manipulated them until she felt the lunge that signaled explosion. His cock leaped and flooded her mouth with raw cum. At the same instant, Margo felt her own orgasm scream as the girl's tongue and teeth and fingers mauled her throbbing pussy.

When the black pulled his cock out, the girls rolled Margo over on her belly. One anointed her wounds while the other brazenly fingered her anus after spreading her thighs wide. Margo could feel any number of thick fingers probing deep into her bowel.

"Please," she moaned. "Oh God! Please help me! Where is Jackson? I'll do anything he wants. Anything!"

She realized she was being blindfolded. A sharp stinging sensation in her right buttock followed by a vicious slap. A needle, what else? This time she didn't want to resist. Total surrender, humiliation. Suddenly Margo felt as if she were floating, a combination of bizarre sensations like drifting, sinking, then flying.

A different penis penetrating her asshole with one solid thrust. Margo could feel female hands supporting her middle and the beginning of the ass-fuck she'd always dreamed of. The pounding of the thick cock into

her sucking anus brought animal grunts and low whimpering, then crazy hysterical shrieks of delight!

Margo's brain was reeling. She could hear herself muttering obscene words, encouraging her fucker. With each violent thrust of the new cock, her body shifted higher and higher on the bed until she was pushed almost off it, supporting herself with her hands on the floor. When she began humping feverishly back on the cock and felt the terrible churning in her pussy that scrambled her senses, the spasm of her orgasm and the involuntary convulsions in her crazy pussy set her brain ablaze.

"Oh my God! My God, oh my God, fuck my ass!" she cried over and over. "God yes, fuck me Jackson! Oh my God, fuck my ass!"

* * *

The "Song of Norway" customarily sounds two earth-shattering ear-splitting blasts as it announces its departure. Before she sails from the dock and all the hawsers are undone, the deep-throated horn gives three mighty blasts.

In Cabin 203, first-class on the starboard side of the gleaming white vessel, Margo Boland lay naked on her bed. When she awoke, she had no idea where she was, but as the ship's great engines began to rumble she realized she was on her way to the next tourist port. She sighed and tried to relax. Lighting a cigarette, her eyes caught sight of a bouquet of flowers and a wicker basket of tropical fruit near the cabin door. Her heart leaped! Flying across the cabin, her fingers fumbled as she read the card: "Love from Charles. I've flown back to N.Y."

Throwing on her robe, her heart pounding, she rushed out on deck. She saw him, Jackson Conrad, standing near the West Indies Company shed, with the cigarillo, the hat, the white suit and the green mirrored glasses. Margo waved frantically, yelling his name.

Jackson brought an admonishing index finger up to his lips and motioned it like a school teacher. Margo saw his familiar bar grin and could almost hear the warning "shsssh" as he turned his back and dissolved into the pier shadows.

APPENDIX B

IN THE DISTRICT COURT
OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 82-26

JABER SAMAD
S & H MANAGEMENT CORP.,
Plaintiff

v.

DRAKES PUBLISHERS, INC.
d/b/a HIGH SOCIETY MAGAZINE,
Defendant.

ETHEL CARR HUNTER MITCHELL, ESQUIRE
25A Dronningens Gade
Suite 1
St. Thomas, Virgin Islands 00801
Attorney for Plaintiff

JOSEPH B. W. ARELLANO, ESQUIRE
Law Offices of Campbell & Arellano
P.O. Box 11899
St. Thomas, Virgin Islands 00801
Attorney for Defendant

MEMORANDUM OPINION

CHRISTIAN, Chief Judge

I

INTRODUCTION

Were the issue presently before this Court whether the published story which forms the basis of this lawsuit were more properly and accurately described as "smut"

as counsel for plaintiffs disdainfully styled it, or "sophisticated gentlemen's entertainment," as the publisher of the magazine which carried the story proudly proclaimed it, the conflicting contention would be utterly facile of resolution. The case with which the Court is faced, however, is an action for defamation[1], spawned by the publication of a fictional short story, "Savage Lust", in the December, 1981, issue of a magazine which appears on the newsstand under that euphemistic appellation, High Society.

Plaintiff, Jaber Samad, was president and sole shareholder of S & H Management Corporation ("S & H"), the co-plaintiff, which operated a bar and restaurant called, and widely known as, The Carousel. Defendant, Drakes Publishers Inc., is the successor in interest to High Society, Inc. ("High Society"), the original defendant, by which the magazine High Society was, at times pertinent herein, published.

The story "Savage Lust" was authored by one Russell Smith, who had once been employed as an editor by a sister publication of High Society. Although a co-defendant throughout most of the litigation, Mr. Smith was severed from the action on August 12, 1985 on stipulation of both sides. He was a free lance writer, however, at the time he was approached by an editor of High Society to write a short story.

"Savage Lust" is the story of Jackson Conrad who once tended bar in a city on the mainland. He fled to St. Thomas after having embezzled all monies from his

---

[1] This case was tried to the Court and submitted after extensive post-trial written summations.

employer's several bank accounts. In St. Thomas he assumed an alias, Jack O'Connor, and bought a bar, the "Carousel," for cash.

The fictional Carousel is located in an "isolated barrio" in the Frenchtown section of St. Thomas in the "U.S. Virgins", and is described as a "sailor's dive complete with half-naked Martinique whores" and a "symbol of tropical decadence and moral decay." It is here that Conrad encounters a woman from his past. Margo Boland, who nurtures an unsatisfied lust for the mysterious Conrad. She is drugged and then taken to Conrad's secluded beachfront residence where she is chained to the deck. After several hours in this position she is forced to engage in a night of sodomy with Conrad and his servants.

The plaintiff, believing the story to be about Samad and the real Carousel, sued to recover for injuries resulting from the allegedly defamatory storyline of "Savage Lust."

II

FACTUAL BACKGROUND

A real bar and restaurant known as the "Carousel Bar" was located on the waterfront in St. Thomas, about a mile from Frenchtown. The bar was popular with both sailors and tourists.

Although its registered name was the "Waterfront Cafe," the establishment was well known as the "Carousel" to local residents and visiting tourists alike. The bar had been operated by a former owner, John Tallman, for a number of years as the "Carousel Bar". Tallman did not sell the rights to the name when he sold the bar to Samad.

A large metal sign with the name "Carousel" hung outside the bar during the entire period that the business was owned and operated by S & H.[2] A sign with the name, the "Waterfront Cafe" hung below the "Carousel" sign.

Russell Smith was well aware of the existence of the real Carousel bar when he wrote the story. Smith had lived in St. Thomas for a period of six or seven months during the 1960's. He returned to the island in November of 1980. During this stay he visited the Carousel in search of his acquaintance, John Tallman. Moreover, one of Smith's wives had worked at the Carousel during Tallman's proprietorship.

Smith and a female companion[3] made several visits to the Carousel in November, 1980. During these visits he became acquainted with Samad. The relationship began on friendly terms until Smith proposed that Samad engage in a sexual relationship, a veritable menage a trois, wholly unimagined by Samad, with Smith and his female companion. Samad adamantly refused and angrily, and with vile epithets ordered Smith to leave the premises, or face bodily ejection.

Samad and Smith met again in June, 1981. Smith then asked Samad if he could write a story about him (the plaintiff). Samad vehemently refused to give permission.

---

[2] The sign "Carousel" hung outside the bar from 1963 to 1983.

[3] Plaintiff Samad refers to this woman as Smith's wife. At his deposition, however, Smith referred to her as his girlfriend.

Smith returned to New York and in July 1981, submitted "Savage Lust" to High Society.

It was an established policy of High Society that all writers who submitted articles or stories which were accepted for publication must sign a "purchase order" before payment would be remitted. In the said purchase order there was a disclaimer which provides that publication (would) not infringe upon any copyright, privacy, proprietory or any other right of any individual or entity.

Smith never signed a purchase order. Despite this, Gloria Leonard, High Society's publisher, accepted the story for publication.

Leonard knew of the existence of the real Carousel. Leonard had resided in nearby Puerto Rico for a period during the 1960's, at which time she had made frequent visits to St. Thomas. The Carousel was then in its heyday. At trial, Leonard testified that she had no knowledge of the existence of the real Carousel. She had had occasion to walk along the waterfront several times. She testified that she could recall the businesses located on either side of the bar. Since her relocation to the mainland, Leonard returned to St. Thomas five or six times. We find that Ms. Leonard's testimony was incredible in that it reflected a selective memory failure. We find, therefore, that she knew of the Carousel's existence. Moreover, Ira Kirshenbaum, vice-president of High Society, testified that he had also visited St. Thomas before the publication. His claimed lack of knowledge of the Carousel is likewise unworthy of belief and I find to the contrary.

A friend of both Samad and his girlfriend, who lived in Boston, there happened to read "Savage Lust." Apparently believing that the story was about Samad and his business place, he called Samad by telephone and told Samad about the story. Shocked and boiling mad, Samad at once purchased his own copy of the magazine at a local store and read the story.[4]

Samad believed the story had been written by Smith about him and his bar in retaliation for Samad's vehement refusal of Smith's sexual proposition. A distraught Samad told his brother, Foad about the story. Faod (who was able to procure the last available copy of the magazine) in turn contacted the rest of the Samad family about the story. His family became alarmed at Samad's seemingly decadent lifestyle, forced him to give up his girlfriend, and tricked him into returning to Palestine. There plaintiff was virtually coerced by his family into a marriage with a palestinian young lady whom he hardly knew, and did not love. The marriage, though consummated, proved to be an unhappy one, but evidently accomplished its purpose, the appeasement of Samad's relatives. Plaintiff later returned to St. Thomas. He did not, however, regain the trust and respect of his family.

---

[4] During this period approximately 275 copies of High Society were sold monthly from newsstands in the Virgin Islands. Defendant derived annual revenues of $5,841.00 from sales in the Territory. Consequently, by Order dated April 9, 1984, we held that the jurisdiction requirements of 5 V.I.C. § 4903, and those demanded by the U.S. Constitution had been satisfied.

III

GENERAL AND CONTROLLING PRINCIPLES

Despite First Amendment ramifications, defamation actions are essentially territorial causes of action. McDowell v. Paiewonsky, 769 F.2d 942, 945 (3rd Cir. 1985); Marcone v. Penthouse International Magazine for Men, 754 F.2d 1072, 1077 (3rd Cir. 1985). Accordingly, adjudication of the case, sub judice requires analysis under both Virgin Islands and Federal Law. McDowell v. Paiewonsky, 769 F.2d at 945. If the Court determines that defendant has injured plaintiff's reputation under the applicable territorial law, we must then determine whether the imposition of liability is nonetheless prohibited by First Amendment considerations. Steaks Unlimited v. Deaner, 623 F.2d 264, 270 (3rd Cir. 1980).

The rules of the common law as expressed in the Restatement (Second) of Torts have been adopted by the Virgin Islands as the substantive law governing defamation actions.[5] McDowell, 769 F.2d at 945; 1 V.I.C. § 4 (1967).

Liability for defamation is created where there is:

(a) a false and defamatory statement concerning another;

---

[5] V.I. Code Ann. Tit. 1, § 4 (1967) provides that:

"The rules of the common law, as expressed in the Restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in absence of local laws to the contrary."

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

RESTATEMENT (SECOND) OF TORTS, § 558 (1977).

Plaintiffs have the burden of proving each of the above elements. Id. at 613.

There is no liability if the communication was privileged. Defendant had the burden of showing the existence of a privilege as provided in RESTATEMENT (SECOND) OF TORTS § 613(2) (1977). Defendant, however, did not raise this issue and the existence of such privilege is not apparent. Accordingly, we conclude that the requirement of unprivileged publication to have been satisfied.

(a) THE STATEMENT PUBLISHED MUST CONCERN THE PLAINTIFFS

Plaintiff must show that the recipients of the communication "correctly, or mistakenly but reasonably, understands that it was intended to refer" to them. RESTATEMENT (SECOND) OF TORTS § 564 (1977). See also Id. at 558.

Defamatory statements found in works of fiction are actionable. RESTATEMENT (SECOND) OF TORTS § 564, comment d (1977). The fact that fiction purports not to concern real persons or events is of no consequence in determining the merits of a defamation action. Note,

"Clear and Convincing" Libel: Fiction and the Law of Defamation, 92 Yale L.J. 520, 536-537 (1983); see also Fetler v. Houghton Mifflin Company, 364 F. 2d 650, 653-54 (2nd Cir. 1966).

Works of fiction are actionable if the reader reasonably understands that the characters are a portrayal of the plaintiff. See, e.g, Geisler v. Petrocelli, 616 F.2d 636, 639 (2nd Cir. 1980); Middlebrooks v. Curtis Publishing, 413 F.2d 141 (4th Cir. 1969). The identification of the plaintiff with the fictional character is reasonable if the description of the character and the events contained in the narrative are so similar to reality that those acquainted with the plaintiff would understand that the plaintiff is the character so depicted. Felter, 364 F.2d at 651. Mere similarities of name or other superficial similarities will not suffice. RESTATEMENT (SECOND) OF TORTS § 564, comment d (1977); Middlebrooks, 413 F. 2d at 143. Furthermore, testimony that someone understood that the character depicted the plaintiff does not satisfy this test. Id.

The plaintiff produced witnesses at trial who testified that they actually believed "Savage Lust" was written about Samad and the Carousel. Neither the physical person of Samad, nor the events of his life, parallel those of the fictional Conrad. Plaintiff is Jordanian; he migrated to St. Thomas from Palestine as a young boy.[6] He attended Charlotte Amalie High School and the College of the

---

[6] We draw no support from defendant's argument that plaintiff is Jordanian and Conrad is caucasian. From the sparse physical description of the character, we are unable to discern the race of Conrad.

Virgin Islands. Samad left the islands to attend the Greater Community College in Connecticut. Upon his return to St. Thomas, he purchased the Carousel. The purchase was partially financed by John Tallman, a former owner by means of a promissory note. Samad borrowed money from Barclay's Bank and his brother to make the necessary downpayment.

Moreover, Samad neither lived with servants, nor did he live on a secluded beach. Rather, he shared a studio apartment with his girlfriend. The apartment was located on a popular St. Thomas beach. He was not rich, nor did he employ servants.

The only similarity between Samad and Conrad is their association with a bar named the Carousel.[7] In light of the marked differences between the two men, no identification of the two as the same person would be reasonable. Thus, we need not consider further the merits of Samad's claims.

Our finding that the story was not "of and concerning" Samad does not mandate a finding that S & H Corp. was not defamed. The dissimilarities between Samad and Jackson would not necessarily prevent patrons of the bar, and others, from reasonably believing that "Savage Lust" was written about the Carousel.

Both bars are known as the Carousel. Both border on the St. Thomas Waterfront. Like the fictional bar, the real

---

[7] Conrad actually own the fictitious bar. The real carousel, however, was owned by S & H. Samad was the sole shareholder of S & H.

Carousel was located in the "U.S. Virgins", and was popular among tourists and was a heavy favorite of sailors of the United States Navy, when on shore leave. Samad's girlfriend, who is tall, blond, and buxom is similar in appearance to the drawing of a woman in the illustration accompanying the story. Samad's girlfriend sometimes worked at the establishment, and, in any event, was there very frequently. While the woman in the illustration appears to have red hair with blond streaks, the caption beside the picture describes Margo Boland as a blond. And, since the Court finds that the picture, of a woman chained to a divan, is intended to depict Margo Boland, the Court similarly concludes that the illustration is that of a blond woman, generously appointed in the area of the bosom, as Samad's girlfriend was described in the testimony.

Furthermore, the Greenhouse, a bar and restaurant located next door to the Carousel was rumored, during that period, to harbor prostitutes from Puerto Rico who would sell their services to sailors in backrooms of the bar.[8] These rumored activities and the proximity of the Greenhouse to the Carousel, both highly popular with sailors on leave, reinforces the reasonableness of the

---

[8] These rumors indeed subsequently became a confirmed fact when a physical altercation between a sailor and one of these "ladies of the night" in a backroom of the Greenhouse ended up before this Court in felony charges docketed at Criminal No. 82-106.

belief that "Savage Lust" was written about the Carousel.[9]

We are not dissuaded by the fact that the fictional Carousel is located in Frenchtown. The area of St. Thomas known as Frenchtown lies about a mile, or less, from the section of the Waterfront, at which the real Carousel is located. The illustration which accompanied the story pictured two islands across the bay. This scene is similar to that which one would observe looking seaward from the waterfront area in the vicinity of the real Carousel, and bears little, or no, resemblance to the water scene looking out from Frenchtown.

In light of the above similarities a reader could reasonably believes, as readers did reasonably believe, that "Savage Lust" portrayed the real Carousel and activities conducted therein. Consequently, the Court finds that the story was of and concerning the Carousel bar and restaurant operated in St. Thomas, in the United States Virgin Islands by S & H.

(b) THE STATEMENT MUST BE FALSE AND DEFAMATORY

A communication is defamatory if it tends "to harm the reputation of another" and lower him in the estimation of the community or . . . deter third persons from associating or dealing with him." RESTATEMENT (SECOND) OF TORTS (1977). "A corporation . . . cannot be

---

[9] As stated above, the bar was well known locally and elsewhere as the Carousel. Thus, we attribute no significance to the fact that the registered name of the bar was the "Waterfront Cafe."

defamed by words . . . which would affect the purely personal repute of an individual. W. Prosser, Law of Torts § 111, at 739 (4th ed. 1977). A corporation, however, does have a business reputation, and may maintain an action when the publication of a false statement adversely affects it in the conduct of its business or deters others from dealing with it. Id. at 745; RESTATEMENT (SECOND) TORTS § 561 (1977).

The corporation need not be specifically named; defamation may be by implication. Note, "Corporate Defamation and Product Disparagement: Narrowing the Analogy to Personal Defamation," 75 Column. L. Rev. at 966. Moreover, liability exists if the publisher wrongfully led the recipients of the statement to believe that the corporate owner knowingly acquiesced or participated in immoral activities on its premises. Id. at 967 n. 24. Cf. El Meson Espanol v. NYM Corporation, 521 F.2d 737, 740 (2d Cir. 1975).

"Savage Lust" portrays the Carousel as a "sailor's dive" where one can meet "half-naked Martinque whores. The bar is further described as a "symbol of tropical decadence and moral decay." The fictional Carousel is a place where a female customer can be drugged and from which she can be kidnapped – by the owner.

Based on the above portrayal of the bar's management, a reader could reasonably infer that the owner's actions, at a minimum, amounts to knowing acquiescence in immoral and illegal conduct on the premises. Such a belief would deter a desirable clientele from patronizing the bar.

Furthermore, the representation that such behavior was normally acceptable in the bar is clearly false. The real Carousel was a respectable establishment and not a place frequented by the type of disreputable characters depicted in the story. In these circumstances, we conclude that S & H has carried its burden of proving that the communication published by High Society is both false and defamatory.

(c) THERE MUST BE FAULT ON THE PART OF THE PUBLISHER

Addressing the issue of fault, we find that High Society has, and had at the time here pertinent, a firm policy of not depicting real places in their fictional stories. In order to insure that such stories do not portray real places, High Society requires its authors to sign a purchase order containing a disclaimer. Smith never signed the required disclaimer. In addition, both Leonard, the publisher who accepted the story for publication, and Kirshenbaum, the vice-president of High Society, knew of the existence of the real Carousel located in St. Thomas. Under the circumstances, defendant had a duty to insure that any story published in its magazine which named the Carousel Bar located in St. Thomas, Virgin Islands did not contain false statements. Defendant, as we have found, knew, because its principal officers knew, of the existence of the Carousel, its true nature and its actual activities. Thus, we attribute to defendant, the knowledge that such statements were false. But even giving the defendant the benefit of any doubt that there might be, if it did not truly know that those statements were false, it acted with reckless disregard as to the truth or falsity of

such statements. Thus, S & H has satisfied its burden of proof regarding the culpability of defendant.

(d) PROOF OF SPECIAL HARM IS NOT REQUIRED

Special harm is defined by the RESTATEMENT (SECOND) OF TORTS, as the loss of something having pecuniary or economic value. RESTATEMENT (SECOND) OF TORTS § 575 comment b (1977). Plaintiff's proof presented at trial consisted solely of Samad's own self-serving testimony. There was no corroborating evidence of economic loss. Such proofs are insufficient to demonstrate loss of income. Connally v. Chardon, 1978 St. X Supp. 372 (DIV 1978).

A corporation, however, may maintain an action for defamatory words which discredit it and tend to cause loss to it in the conduct of its business. RESTATEMENT (SECOND) OF TORTS § 561 comment b (1977). Such a statement is actionable per se. Damages are assumed to flow from the publication of statements of this nature. Thus, proof of special harm is not required. Id. at § 621 comment a.

The publication of "Savage Lust" satisfies the foregoing test. The story, if read and believed by certain potential customers, would dissuade them from patronizing the Carousel. Such being the case, no proof of economic loss is necessary.

(e) CONSTITUTIONAL LIMITATIONS

In the landmark case of New York Times v. Sullivan 376 U.S. 254 (1964), the United States Supreme Court held that the First Amendment limits the reach of state defamation laws. The Court found that the First Amendment

afforded one the right to criticize public officials, without the common law defamation restraints. Id. at 269. The Court held, therefore, that a public official cannot recover damages for defamatory falsehoods absent malice – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 280.

The Supreme Court further explicated the limits of the First Amendment on state defamation law in Gertz v. Robert Welch, Inc., 418 US 323 (1974). Gertz involved the issue of whether a plaintiff who was not a public official could recover damages for statements which constituted libel per se under Illinois Law. The statements in Gertz weighed the competing interests of a state to protect its citizens from defamatory falsehoods against the First Amendment concern of free debate on public issues. Striking a balance, the Court held that:

> "So long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

Id. at 347.

The High Court opined that the legitimate state interest in compensating private individuals for injury to reputation extended only to compensation for actual injury. Thus, the Court reasoned that "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Id. at 349.

The Supreme Court made its latest pronouncement on the interplay between state defamation law and the

First Amendment in Dunn & Bradstreet, Inc. v. Greenmoss, ___ U.S. ___, 105 S. Ct. 2939 (1985). Dunn & Bradstreet involved the defamation of a private plaintiff regarding a matter of purely private concern.[10]

The Court held that under the circumstances presented by Dunn & Bradstreet, the award of presumed and punitive damages on a showing of mere negligence was constitutionally permissible. We note that a state or territory is still free to choose for itself the appropriate standard of culpability required prior to the imposition of liability in a defamation action which involves a private plaintiff and a dispute over private concerns.

As stated above, defendant acted with culpability sufficient to satisfy the 'actual malice' standard announced in New York Times. Therefore, regardless of the standard chosen by the Virgin Islands, liability for presumed damages will be imposed in this case. As a consequence, we do not decide if negligent actions would be sufficient to justify the imposition of liability. Such a case is not before us.

While we are content to rest our decision that plaintiff S & H was indeed defamed by defendant, and is entitled to an award of money damages, even in the absence of proof of actual or special loss, we feel moved to note a further basis of liability in this cause.

The Supreme Court in Dunn & Bradstreet, held that under the circumstances there presented, the First

---

[10] As in Dunn & Bradstreet, S & H is also a private plaintiff involved in a matter of private concern.

Amendment does not prohibit the recovery of presumed or punitive damages on a showing of fault less than actual malice. 105 S. Ct. at 2948. The Court did not, however, alter the holding of Gertz which provided that states may choose the appropriate standard of culpability required in a defamation action involving a private plaintiff, so long as they do not impose a standard of strict liability. Gertz, 418 at 347.

By adopting the RESTATEMENT (SECOND) OF TORTS, the Virgin Islands has defined the standard of fault necessary to impose liability for defamation actions brought in this territory. Guided by the principles enunciated in Gertz, the RESTATEMENT (SECOND) OF TORTS provides that damages which flow from a defamation which is actionable per se must be proven and cannot be presumed. RESTATEMENT (SECOND) OF TORTS § 621 comment a (1977). The American Law Institute has taken no position on whether recovery, in the absence of proof of actual harm, is permissible when a defendant acted with 'actual malice' as defined by New York Times. RESTATEMENT (SECOND) OF TORTS Caveat to § 621 (1977).

In the absence of an existing applicable Virgin Islands statute or relevant section of the RESTATEMENT (SECOND) OF TORTS, we are guided by the general principles of common law.

At common law, a publisher of a false and defamatory statement who acted with 'actual malice' was liable for damages which were assumed to flow from the defamatory statement. Gertz, 418 US at 349-50. As stated above, defendants in this action acted with culpability

which satisfies the standard of actual malice. That being the case, we conclude that plaintiff may recover presumed damages as caused by the defamatory statements.

IV

CONCLUSION

On all the foregoing this Court concludes that Plaintiff Jaber Samad was not defamed by the publication of the story "Savage Lust" and is, therefore, not entitled to recover from defendant Drakes Publishers, Inc. It is our conclusion, however, that Plaintiff S & H Management Corporation was defamed by the publication of the above-mentioned story and is entitled to recover damages from defendant Drakes Publishers, Inc. in the sum of Seventy-five Thousand (75,000.00) Dollars, together with partial indemnification for costs and attorney's fees.

DATED: March 2, 1987

APPENDIX C

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST JOHN

Civil No. 82-26

JABER SAMAD, S & H MANAGEMENT CORP.,
Plaintiff

v.

DRAKES PASSAGE, INC.
d/b/a HIGH SOCIETY MAGAZINE,
Defendant,

ETHEL CARR HUNTER MITCHELL, ESQUIRE
25A Dronningens Gade
Suite 1
St. Thomas, Virgin Islands 00801
Attorney for Plaintiff

JOSEPH B.W. ARELLANO, ESQUIRE
Law Offices of Campbell & Arellano
P.O. Box 11899
St. Thomas, Virgin Islands 00801
Attorney for Defendant

MEMORANDUM AND ORDER

CHRISTIAN, Chief Judge

Defendant Drakes Publishers, Inc. d/b/a High Society Magazine[1] ("High Society") has moved the Court for

[1] The instant motion was filed on behalf of High Society Magazine. Drakes Publishers, Inc. has been substituted as defendant in this cause. Accordingly, we will treat the motion as one filed on behalf of Drakes Publishers.

judgment notwithstanding the verdict or, in the alternative to amend the findings of facts entered in this cause on March 2, 1987.[2] Defendant contends that the relief requested is warranted because the court mistakenly based its finding that agents of High Society Magazine knew about the existence of the real Carousel upon our disbelief of the testimony given by both Ira Kirschenbaum, vice president of High Society, and Gloria Leonard the publisher of the magazine. Accordingly, defendant argues that our finding that defendant acted with actual malice is not supported by substantial evidence found in the record. For the reasons which follow, the motion will be denied.

(1) It is well settled that "when the testimony of a witness is not believed, the trier of fact may disregard it. Normally, the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." Bose Corp. v. Consumer Union of United States, Inc., 104 S Ct. 1949, 1966 (1984). See also, Nishikawa v. Dulles, 356 US 129, 136-37 (1958); Moore v. Chesapeake & Ohio R. Co., 340 US 537, 537 (1951). Our finding that agents of High Society knew of the existence of the Carousel located in St. Thomas, however, was not based upon the discredited testimony of defendant's witnesses.

As we stated in our Memorandum Opinion entered on March 2, 1987, Leonard resided in Puerto Rico during

---

[2] This cause was tried to the Court, and not before a jury. A motion for judgment notwithstanding the verdict is, therefore, inappropriate. Consequently, we will treat defendant's motion as one to amend the findings of fact entered in this matter by the Court on March 2, 1987.

the 1960's, at which time she made frequent visits to this island. The Carousel was then at its peak of popularity. Leonard testified that she had occasion to walk along the waterfront several times. At trial, she was able to recall the businesses located on either side of the Carousel. After her return to the mainland, Leonard visited St. Thomas six or seven times. Kirschenbaum also testified that he had visited St. Thomas.

(2) It was an established policy that all writers who submitted articles or stories for publication in High Society were required to sign a purchase order. The purchase order contained a disclaimer which provided that the publication would not infringe upon any copyright, privacy, proprietory or any other right of any individual or entity. Leonard accepted the story about the Carousel despite the author's failure to sign the necessary disclaimer.

(3) The Court, as the trier of fact, was permitted to find an ultimate fact to be true upon proof of other facts, if upon consideration of all circumstances revealed by the evidence, the Court was satisfied that in logic and common experience, the ultimate fact was more likely than not to follow from the fact was more likely than not to follow from the fact proven. McInerney v. Berman, 473 F. Supp. 187, 188 (D. Mass. 1979), aff'd 621 F.2d. 1162 (10th Cir. 1977), citing The Wenona, 86 US 41, 58 (1873).

The inferences which can be drawn from the evidence outlined above clearly supports the finding entered by the Court in this cause.

ORDER

The premises considered, therefore, and the Court being fully advised,

IT IS ORDERED that the motion of defendant Drakes Publishing Inc. d/b/a High Society Magazine to amend the findings of fact entered in this cause on March 2, 1987 be, and the same is, hereby DENIED.

DATED: July 2, 1987

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

ATTEST:

ORINN ARNOLD
Clerk of Court

By: /s/ Frank Blackman
Deputy Clerk

APPENDIX D

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Civil No. 82-26

JABER SAMAD, S & H MANAGEMENT CORP.,
Plaintiff

v.

DRAKES PUBLISHERS, INC.
d/b/a HIGH SOCIETY MAGAZINE
Defendant.

JUDGMENT

This action having come for trial before the Court, The Honorable Almeric L. Christian, Chief Judge presiding, and the issues having been duly tried and a decision having been rendered, it is

ORDERED and ADJUDGED that Plaintiff S & H Management Corp. recover from defendant Drakes Publishers, Inc. d/b/a High Society Magazine the sum of seventy-five Thousand ($75,000.00) Dollars with interest from the date of Judgment.

FURTHER ORDERED and ADJUDGED that plaintiff Jaber Samad take nothing and that the action be DISMISSED as to the said plaintiff on the merits.

DATED: July 24th, 1987

/s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

ATTEST:

ORINN ARNOLD
Clerk of Court

By: /s/ Frank Blackman
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3582

JABER A. SAMAD and S & H MANAGEMENT CORP.,
Appellants

v.

HIGH SOCIETY MAGAZINE AND RUSSELL SMITH

No. 87-3583

JABER A. SAMAD and S & H MANAGEMENT CORP.

v.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
DRAKES PUBLISHERS, INC. d/b/a/
HIGH SOCIETY MAGAZINE,
Appellant

On Appeal from the United States District Court
of the Virgin Islands (St. Thomas)
(D.C. Civil No. 82-0026)
District Judge: Almeric L. Christian

Argued April 19, 1988

Before: SEITZ, SLOVITER and BECKER,
Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Each party to bear its own costs.

Attest:
/s/ Sally Mrvos
Clerk

By the Court,
/s/ Dolores K. Sloviter
Circuit Judge

Dated: Apr. 29, 1988

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3582

JABER A. SAMAD and S & H MANAGEMENT CORP.,
Appellants

v.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH
Appellee

No. 87-3583

JABER A. SAMAD and S & H MANAGEMENT CORP.
Appellee

v.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH,
DRAKES PUBLISHERS, INC.,
d/b/a/ HIGH SOCIETY MAGAZINE,
Appellant

Present: GIBBONS, Chief Judge, SEITZ, HIGGINBOTHAN, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA and COWEN, Circuit Judges

SUR PETITION FOR REHEARING

The petition for rehearing filed by Drakes Publishers, Inc., d/b/a High Society Magazine, Appellant in No. 87-3583, and Appellee in No. 87-8582, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active

service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

DATED: May 31, 1988

APPENDIX G

VIRGIN ISLANDS CODE, TITLE 1, SECTION 4

4. APPLICATION OF COMMON LAW; RESTATEMENTS

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws in the country.

APPENDIX H

RESTATEMENT OF TORTS 2d

ELEMENTS OF A CAUSE OF ACTION FOR DEFAMATION

558. ELEMENTS STATED

To create liability for defamation there must be:

(a) a false and defamatory statement concerning another;

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication

559. DEFAMATORY COMMUNICATION DEFINED

A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.

561. DEFAMATION OF CORPORATION

One who publishes defamatory matter concerning a corporation is subject to liability to it

(a) if the corporation is one for profit and the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it, or

(b) if, although nor for profit, it depends upon financial support from the public, and the matter tends to

interfere with its activities by prejudicing it in public estimation.

Comment on Clause (a):

b. A corporation for profit has a business reputation and may therefore be defamed in this respect. Thus a corporation may maintain an action for defamatory words that discredit it and tend to cause loss to it in the conduct of its business, without proof of special harm resulting to it. (See 569, Comment e)

564. APPLICABILITY OF DEFAMATORY COMMUNICATION TO PLAINTIFF

A defamatory communication is made concerning the person to whom its recipient correctly or mistakenly but reasonably, understands that it was intended to refer.

Comment:

a. Person intended. It is necessary that the recipient of the defamatory communication understand it as intended to refer to the plaintiff. If it is in fact intended to refer to him, it is enough that it is so understood even though he is so inaccurately described that is extraordinary that the communication is correctly understood. If however, the recipient does not understand that the plaintiff is intended by it, the fact that the defamer intended to refer to him is immaterial.

b. Person mistakenly but reasonably believed to be intended. If the communication is reasonably understood by the person to whom it is made as intended to refer to the plaintiff, it is not decisive that the defamer did not intend to refer to him. (But see Comment f). It is

not enough however, that the defamatory matter is actually understood as intended to refer to the plaintiff; the interpretation must be reasonable in the light of all the circumstances. It is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended. Extrinsic facts may make it clear that a statement refers to a particular individual although the language used appears to defame nobody. (See Comments c, d and f). It is not necessary that everyone recognize the other as the person intended; it is enough that any recipient of the communication reasonably so understands it. However, the fact that only one person believe that the plaintiff was referred to is an important factor in determining the reasonableness of his belief. If the applicability of the defamatory matter to the plaintiff depends upon extrinsic circumstances, it must appear that some person who saw or read it was familiar with circumstances and reasonably believed that it referred to the plaintiff. As to the use of the inducement, colloquium and innuendo, in making the averments, see 563, Comment f.

c. Fictitious Character. A libel may be published of an actual person by a story or essay, novel, play or moving picture that is intended to deal only with fictitious characters if the characters or plot bear such a resemblance to actual persons or events as to make it reasonable for its readers or audience to understand that particular character is intended to portray that person. Mere similarity of name alone is not enough; nor is it enough that the readers of a novel or the audience of a play or a moving picture recognize one of the characters

as resembling an actual person, unless they also reasonably believe that the character is intended to portray that person, it is not decisive that the author or playwright did not so intend. (See Comment f). The fact that the author or producer states that his work is exclusively one of fiction and in no sense applicable to living persons is not decisive if readers actually and reasonably understand otherwise. Such a statement, however; is a factor to be considered by the jury in determining whether readers did so understand it, or if so, whether the understanding was reasonable.

Illustration:

1. The A motion picture producing company produces a film based upon historical events but offered as a fictitious play. In the film, B, a young woman who was a participant in some of these events, is represented as having yielded to the hypnotic power of the villain. In spite of the deviations of the film from the exact historical facts, B's friends reasonably understand that she is portrayed in the picture. The film is defamatory of B.

569. LIABILITY WITHOUT PROOF OF SPECIAL HARM----LIBEL

One who falsely publishes matter defamatory of another in such a manner as to make the publication a libel is subject to liability to the other although no special harm results from the publication.

Libelous imputation of immorality. It is actionable per se to accuse in libelous form either a man or woman of any sexual misconduct irrespective of whether the misconduct constitutes a criminal offense or whether it harms

the other in his business, trade or profession. *Thus it is actionable per se to accuse by a libelous publication either a man or woman of adultery or fornication* or to accuse another of keeping a house of ill fame or frequenting such a house. Any abnormal sex conduct or tendency comes within the rule stated in this Section whether or not it constitutes a crime. So too, it is libelous to charge another with insulting proposals to members of the opposite sex, or any kind or lascivious or grossly immodest conduct.

Illustration:

1. The A newspaper publishes a statement that B, "whose ostensible occupation is trimming hats, is the mistress of C." A is subject to liability to both B and C.

Libelous accusations of untruthfulness or dishonesty. It is actionable per se to impute to another in libelous form conduct that tends to lower the other's reputation for veracity or honesty, irrespective or whether the conduct constitutes a criminal offense and irrespective of whether it tends to affect the trade, business or profession of the other. Thus it is actionable so to accuse another of the crime of perjury, larceny or embezzlement, or to make any derogatory imputation of fact concerning another's veracity or integrity. Statements that another has cheated or taken unfair advantage in a business transaction or that he has in any way defrauded others, as by refusing to pay his debts, are within the rule stated in this Section.

570. LIABILITY WITHOUT PROOF OF SPECIAL HARM----SLANDER

One who publishes matter defamatory to another in such a manner as to make the publication a slander is

subject to liability to the other although no special harm results if the publication imputes to the other

(a) a criminal offense, as stated in 571, or

(b) a loathsome disease, as stated in 572, or

(c) matter incompatible with his business, trade, profession, or office as stated in 573, or

(d) serious sexual misconduct, as stated in 574.

571. SLANDEROUS IMPUTATIONS OF CRIMINAL CONDUCT

One who publishes a slander that imputes to another conduct constituting a criminal offense is subject to liability to the other without proof of special harm if the offense imputed is of a type which, if committed in the place of publication, would be

(a) punishable by imprisonment in a state or federal institution, or

(b) regarded by public opinion as involving moral turpitude.

573. SLANDEROUS IMPUTATIONS AFFECTING BUSINESS, TRADE, PROFESSION OR OFFICE

One who publishes a slander that ascribes to another conduct, characteristics or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade or profession, or of his public or private office, whether honorary or for profit, is subject to liability without proof of special harm.

574. ALL SLANDEROUS IMPUTATIONS OF SEXUAL MISCONDUCT

One who publishes a slander that imputes serious sexual misconduct to another is subject to liability to the other without proof of special harm.

580 B. DEFAMATION OF PRIVATE PERSON

One who publishes a false and defamatory communication concerning a private person, or concerning a public official or public figure in relation to a purely private matter not affect his conduct, fitness or role in his public capacity, is subject to liability, if, but only if, he

(a) knows that the statement is false and it defames the other

(b) acts in reckless disregard of these matters, or

(c) acts negligently in failing to ascertain them.

Comment. h. **Factors in applying the negligence standard**. In determining whether the defendant acted as a reasonable, prudent person under the circumstances in publishing the defamatory communication on the basis of his check or lack of check as to its accuracy and as to its defamatory character, there are factors to be taken into consideration; the thoroughness of the check that a reasonable person would make before he published the statement may vary with the play of these factors. The standard of care does not change, but its application may vary with the circumstances. One factor is the time element. Was the communication a matter of topical news requiring prompt publication to be useful, or was it one in which time and opportunity were freely available to investigate? In the latter situation, due care may require a

more thorough investigation. A second factor is the nature of the interests that the defendant was seeking to promote by publishing the communication. Informing the public as to a matter of public concern is an important interest in a democracy; spreading of mere gossip is of less importance. How necessary was this communication to these recipients in order to protect the interest involved? If there was no substantial interst to protect in publishing the communication to these recipients, then a reasonable person would be hesitant to publish the communication unless he had good reason to believe that it was accurate.

A third factor is the extent of the damage of the plaintiff's reputation or the injury to his sensibilities that would be produced if the communication proves to be false. Was the communication defamatory on its face? Would its defamatory connotation be known only to a few? How extensive was the dissemination? How easily might the plaintiff protect his reputation by means at his own disposal?

There has been no indication that proof of fault in the ordinary defamation case must meet the unusual stand of "clear and convincing proof" that the Supreme Court has held to be required in showing knowledge or reckless disregard as to falsity in an action by a public official or a public figure. (See 580A, Comment f). It seems doubtful that this requirement will be imposed in the application of the rule set forth in this Section.

APPENDIX I

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

Civil No. 82-26

JABER A. SAMAD AND S & H MANAGEMENT CORP.,
Plaintiffs,

vs.

HIGH SOCIETY MAGAZINE AND RUSSELL SMITH,
Defendants.

DEFENDANT'S FIFTH SET OF
INTERROGATORIES, REQUESTS FOR ADMISSIONS
AND DEMAND FOR PRODUCTION
OR DOCUMENTS

TO: Jaber A. Samad and
S & H Management Corp.
c/o Ethel Mithcell, Esq.
25 A Dronningens Gade
Suite 1
St. Thomas, Virgin Islands

Pursuant to Rule 33, 34 and 36 of the Federal Rules of Civil Procedure, the following Interrogatories, Requests for Admissions and Demand for Production of Documents are propounded by Defendant High Society in the above-captioed action to the Plaintiffs and are to be answered under oath within the time provided by said Rules.

25A. Do you ADMIT THAT the Carousel is easily visible, and that one could not help to notice it walking down the waterfront.

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

Civil No. 82-26
JABER A. SAMAD and S & H MANAGEMENT CORP.,
Plaintiffs,

vs.

HIGH SOCIETY MAGAZINE and RUSSELL SMITH
Defendants.

ORDER

THIS MATTER came before the Court on Motion of Defendant High Society to deem admitted those demands for admissions contained in its Fifth Set of Interrogatories, Demand for Admissions and Demand for the Production of Documents (Fifth Set). The Defendant's Fifth Set having been served on Plaintiff's counsel on or about May 13, 1985 and the Plaintiffs having failed, neglected and refused to answer or otherwise respond to said demands for admissions, and this Court having orally entered an Order on June 24, 1985 in open court deeming said requests to admit as contained in Defendant's Fifth Set as being admitted, and the premises considered it is hereby ORDERED that the demands for admissions contained in Defendant's Fifth Set be and hereby are deemed admitted pursuant to F.R.Civ.P. 36 for purposes of this lawsuit.

DATED: August 6, 1985 /s/ Almeric L. Christian
ALMERIC L. CHRISTIAN
Chief Judge

ATTEST:
GEOFFREY W. BARNARD
Clerk of the Court
by /s/ Frank Blackman

APPENDIX J

TRIAL TESTIMONY OF GLORIA LEONARD
VOLUME I 330 OF THE TRIAL TRANSCRIPT

Q. Do you believe that you are – as a professional, is it your opinion that you can libel someone in fiction?

A. I believe you can.

Q. And as a professional, when would that occur?

A. Again ----

MR. ARELLANO: Your Honor, that question is vague.

THE COURT: It isn't that it is vague, but you see now, Mrs. Mitchell, you have gotten this witness to answer a question in a way that is directly contrary to Mr. Arellan's opening statement as a lawyer.

MRS. MITCHELL: I know.

THE COURT: What do you expect me to do accept her word on this matter?

MRS. MITCHELL: No. She is the publisher and I think it is from her that the policy of her magazine and the policy of the industry should be learned.

THE COURT: The policy of the magazine is certainly within her competence. The policy of the industry is within her competence. But the legal aspect is not.

MRS. MITCHELL: I am not asking for the legal aspect. I was asking her to define for me what ---

THE COURT: You asked the witness a moment ago something to the effect of whether it was possible to libel

somebody in piece of fiction and the witness answered, yes.

MRS. MITCHELL: Yes.

THE COURT: All right, Mr. Arellano in his opening statement said, did he not, that specifically because this is purely fiction it can't be libel?

MRS. MITCHELL: And your Honor, I am trying to show that the publisher knew that it could be possible to libel someone in fiction.

THE COURT: All right, very well. She has answered your question.

And Trial Transcript Volume II page 287

Q. Now Miss Leonard, when I deposed you back in February, on page 32 I asked you this question: "In you professional opinion, if you had known that there was a place called the Carousel Bar, would you have published the article?"

And your answer was, "No, more than likely no, or we would have changed the name."

Do you still hold to that opinion

A. No, we do not.

Q. What is your opinion now; you would have published it anyway?

A. My opinion is, after all the events that have transpired – and I am a voracious reader in my own right and am partial to reading fiction. And every time I read fiction, inevitable there is a mention of a real place or a real person. So that, no, I would still have published it had I known there was a Carousel.

See also page 310 of Volume I of Trial Transcript

MS. MITCHELL: Yes, sir.

BY MS. MITCHELL:

Q. Now Miss Leonard, you told me you had lived in Puerto Rico at one time; is that correct?

A. That's correct.

Q. When was that, approximately?

A. Approximately from 1968 to 1970.

Q. And when you were living in Puerto Rico, did you have occasion to come to St. Thomas?

A. On a number of occasions, yes.

Q. And when you came to St. Thomas, did you go on the waterfront?

A. Yes.

Q. And would you say each time you came, you generally went on the waterfront?

A. I think it's practically an impossible task to come to St. Thomas and avoid the waterfront.

THE COURT: So, you would say that each time –

THE WITNESS: Yes.

THE COURT: All right.

APPENDIX K

DEPOSITION OF IRA KIRSCHEMBAUM, VICE-PRESIDENT OF PETITIONER

Q. Was there any procedure for rejecting an article if it appeared to depict a real person or place?

A. As I generally said, we try to publish only fiction, since we are a non-controversial magazine, and if we felt anything was real, it would be rejected immediately. (Deposition page 33)

Q. In your professional opinion if you knew that his article referred to a specific business, would you have required and investigation?

A. Yes.

Q. Have you ever refused to publish an article that referred to a particular person?

A. Yes. (Deposition page 38)

Q. What exactly were you told or what information were you given with regard to libel?

A. Never to depict real people or real places in stories, unless they are meant to be that way.

Q. How many persons in your organization were told of this?

A. Everybody who worked on the magazine. (Deposition page 41)

A. Still the same guidelines. Try to make sure everything is fictional, but we do not have an investigative team to go out into the field and research every story that comes in.

Q. When a story comes in, do you find out if there is such a place? You name St. Thomas.

A. Right.

Q. Do you find out if there is such a business in St. Thomas before you publish?

A. We try to. (Deposition page 45)

Q. Did you have any discussions with Ms. Leonard as to procedures for investigating your stories?

A. Ms. Leonard does not have a general working knowledge of what should be checked out before a story is published in High Society Magazine.

Q. Did you give her that knowledge?

A. We gave it to her, plus we have discussed it many times in our organization, although there are no formal written Guidelines.

Q. What exactly was discussed?

A. That anything that is published should be checked out as carefully as possible and that if it is actual, that releases be obtained and if it is fictional, make best efforts. (Deposition pages 72-73)

Q. Have you ever been to St. Thomas?

A. I believe I have.

Q. Have you ever been on the waterfront on St. Thomas?

A. Yes. (Deposition page 27)

APPENDIX L

HARVEY SHAPIRO DEPOSITION, EXPERT WITNESS FOR PETITIONER AS TO INDUSTRY STANDARDS

Q. Do you believe that you are – as a professional, is it your opinion that you can libel someone in a fiction?

A. I believe you can. (lines 14-17)

Q. And as a professional, when would that occur?

A. Again ----

Q. Would you knowingly include the name of a business, an existing business, in one of your stories in a manner that would be derogatory or defamatory?

A. No.

Q. Would you include the name of a person who lives in a place if you knew that story is supposed to be about that person or seems to identify that person?

A. No . . . (next question omitted)

Q. Do you think that the identification of a private person in an erotic fiction story would constitute defamation if it were not true?

A. Yes, I guess so.

Q. Would you feel responsible if you defamed a real person?

A. Yes.

(Deposition pages, 16 and 22)